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OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF OF AMICI CURIAE ON BEHALF OF PEOPLE AGAINST CHILD ABUSE, THE ASSOCIATION FOR CHILDCARE EXCELLENCE, THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AND ROSIE'S PATROL

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Council for People Against Child Abuse

QUESTION PRESENTED

Does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before one-way closed circuit television proceedings may be invoked, in the context in which individualized findings regarding the need to protect child witnesses are made and the witnesses, ages four to seven, are subjected to criminal cross-examination at trial?

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INTEREST OF AMICI CURIAE

This brief, in support of the Brief for Petitioner, State of Maryland, is submitted on behalf of People Against Child Abuse, the Association for Childcare Excellence, the National Center for Missing and Exploited Children and Rosie's Patrol. The written consent of the parties has been obtained and submitted to the Clerk.

People Against Child Abuse ("PACA") is a private, nonprofit, state-wide organization dedicated to the prevention and elimination of child abuse and neglect in the State of Maryland. PACA is the Maryland chapter of the National Committee for the Prevention of Child Abuse. PACA attempts to accomplish its goals through legislative efforts, conferences on victims' rights, establishing support groups and community education.

The Association for Childcare Excellence ("ACE") is a Maryland organization of parents and professionals dedicated to promoting safe and affordable childcare for the citizens of Maryland. ACE advocates for childcare licensing standards which will produce safe and enriching environments for children. One of ACE's primary goals is to increase protection for children in day care.

The National Center for Missing and Exploited Children ("NCMEC") is a nonprofit corporation with the national goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children.

Rosie's Patrol is a community-based volunteer organization founded as a tribute to a ten year-old girl who was abducted from her neighborhood and later murdered in July 1989. Rosie's Patrol volunteers work to help prevent the re-occurrence of such crimes and other offenses which make children victims.

The *amici* have an interest in this matter because they are child advocacy groups dedicated to advancing

the rights and interests of victims of child abuse. The *amici* are convinced that as a result of the Maryland Court of Appeals' erroneous interpretation of this Court's decision in *Coy v. Iowa*, 108 S. Ct. 2798 (1988), and the Sixth Amendment to the United States Constitution, child abuse victims will be unnecessarily traumatized and many perpetrators of child abuse will go unpunished.

The *amici*, therefore, submit this brief in support of the Petitioner, the State of Maryland, and request that this Court clarify the constitutional protections provided to alleged perpetrators of child abuse by the Sixth Amendment to the United States Constitution, in light of its holding in *Coy*.

SUMMARY OF ARGUMENT

The Maryland Court of Appeals in *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989), *cert. granted*, 110 S. Ct. 834 (1990), reversed the conviction of Sandra Ann Craig by a jury of child abuse, first and second degree sexual offenses, perverted sexual practice, and assault and battery on a child who had attended her day care center. At the trial, the victim, then a girl seven years-old, as well as two five year-old boys and a four year-old girl, who the state alleged also had been abused by Craig at her day care center, testified via one-way closed circuit television. This procedure is authorized by Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989) so long as the trial judge first "determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." The trial judge in *Craig* relied

on testimony by treating therapists as to each child's inability to communicate in the courtroom.

Noting *Coy*'s insistence on the defendant's right to a face-to-face confrontation with the accuser, Maryland's highest court found that the threshold showing of necessity for use of the one-way closed circuit television procedure in *Craig* was insufficient. The court held that a judge may not rely solely on expert testimony to make a finding of witness unavailability under the Maryland statute, but instead must observe the child being questioned face-to-face with the defendant twice, once in person and once via two-way closed circuit television. Only after the judge observes that the child is in such emotional distress from the face-to-face confrontations as to be unable to reasonably communicate, may the Maryland closed circuit protective procedure be used.

Forcing every child abuse victim to face the accused hampers two compelling state interests: protection of children and the prosecution of crimes. There is general agreement that face-to-face confrontation of many child abuse victims with their abusers in court retraumatizes the victims, who often have been repeatedly abused as well as threatened into silence. The emotional distress of such child victims when confronting defendants in the traditional courtroom setting makes them less available as witnesses. This is because parents may refuse to allow children to participate in traumatizing proceedings. Moreover, the ability of the child victims to testify accurately and completely is undermined by the courtroom stress. Since often the only witness in a child abuse case is the child, successful prosecutions are, consequently, thwarted.

This Court's decisions indicate that the Constitution does not confer on every accused the right to a strict face-to-face confrontation with his accuser. Rather, the accused's Sixth Amendment rights incorporate a concept of balancing in the interests of justice. Where compelling state interests are involved, as in *Craig*, minimal infringement on the defendant's confrontation right is justified.

Thus, the Sixth Amendment is not violated in a child abuse prosecution where the judge has made an individualized determination of the necessity for allowing the child to testify via one-way closed circuit television, and the child does so under oath, is seen by the jury and is subject to thorough cross-examination.

ARGUMENT

I. BECAUSE OF CHILD ABUSE VICTIMS' UNIQUE VULNERABILITY, A STRICT FACE-TO-FACE CONFRONTATION REQUIREMENT DAMAGES CHILD WITNESSES AND HAMPERS THE PROSECUTION OF CHILD ABUSE.

The instant case raises squarely the question of how to balance the accused's Sixth Amendment confrontation right against the state's interests in protecting children and prosecuting child abuse. In attempting to comply with this Court's ruling in *Coy*, the Maryland Court of Appeals requires the child victim to face the accused twice and exhibit twice the statutorily requisite "severe emotional distress" so as to be demonstrably unable to proceed *before* the child is entitled at trial to the protection intended by the Maryland one-way closed circuit television statute.

This procedure inflicts on the child witness the very trauma the statute is meant to alleviate.[1]

In addition, as the opinion of the Maryland Court of Special Appeals recognized:

> [I]f the child victim is . . . so 'traumatized' by a face-to-face confrontation as to be unable to 'reasonably communicate'—the truth of the matter might never be revealed, a terrible crime might go unredressed, and a dangerous person might be turned loose to continue his or her predation. . . .

Craig v. State, 76 Md. App. 250, 283, 544 A.2d 784, 800 (1988), *rev'd*, 316 Md. 551, 560 A.2d 1120 (1989), *cert. granted*, 110 S. Ct. 835 (1990). Thus, the insistence on a strict face-to-face confrontation of the abused child by the defendant, in every case, in addition to re-traumatizing the child, will likely cause the rate of child sexual abuse prosecutions, already low,[2] to drop further.

[1] For tactical reasons, prosecutors would not consider using closed circuit television unless they were dealing with a child who had been so traumatized that the child could not communicate effectively in open court, before the jury, in the defendant's presence. *See* Myers, *Legal Response to Child Abuse: In The Best Interest of Children?*, 24 J. Fam. L. 149, 240 (1985-86). Neither responsible prosecutors nor parents will be willing to put such a traumatized child through the ordeal fashioned by the Maryland Court of Appeals, nor, after the ordeal, will this thrice-traumatized child be likely to be able to proceed via one-way closed circuit television. Thus, the holding of the Court of Appeals virtually guarantees some abusers immunity from prosecution.

[2] It is estimated that only 24% of all cases nationwide result in criminal actions. Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 N.Y.L. Sch. Hum. Rts. Ann. 441, 446 (1986). A recent national study concluded that only 30% of all substantiated day care child sexual abuse cases proceed to trial. Finkelhor, Williams and Burns, *Nursery Crimes: Sexual Abuse in Day Care* 217 (1988).

Responsible parents may forego reporting the crime or subsequently refuse to cooperate with the state if they know that their children will be further traumatized by a trial in which they must confront the accused.[3] Cases will also be abandoned or go unprosecuted because of truthful child victims' refusals to testify, inability to give complete or accurate accounts when confronting the alleged abuser in court proceedings and false recantations out of fear.

Even if the crime is detected and prosecuted, loss of the child's testimony because of insistence on face-to-face confrontation would mean the denial to the jury of the most pivotal, probative part of the case. It surely better serves the interests of truth-finding and the securing of justice to recognize the child victim's unique vulnerability and to have the child's testimony presented, as in *Craig*, live, at trial, under oath, and subject to full cross-examination in the view of the jury via closed circuit television.

A. It Is Generally Agreed that Testifying in the Courtroom Re-Traumatizes Child Abuse Victims.

There is widespread agreement that ordinary judicial proceedings are extremely stressful for many

[3] Bainor, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 Fordham L. Rev. 995, 997, 1000 (1985). In the Finkelhor day care study, the victim or parents withdrew cooperation in 12% of the cases after arrests were made because of concern about possible trauma from court proceedings. Finkelhor, Williams and Burns at 219-20.

child abuse victims.[4] Those proceedings were designed by adults for the trial of adults by presentation of adult witnesses before adult jurors and judges. Yet, as many as one-third of the victims of child sexual abuse are under age six.[5]

Components of legal proceedings, such as facing the accused and the formal courtroom atmosphere, are capable of putting a child victim under prolonged mental stress and endangering the child's emotional equilibrium.[6] Courtroom testimony is associated with increased behavioral disturbances in children.[7] Specifically, researchers who have compared the adjustment of child victims involved in court proceedings with that of child victims who did not go to court found that children who testified showed greater disturbance than non-testifiers.[8]

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[4] *See, e.g.*, Goodman and Hegelson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami L. Rev. 181, 203 (1985); Whitcomb, Shapiro, and Stellwagen, *When The Victim Is A Child: Issues For Judges And Prosecutors* 17-19 (1985).

[5] Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 Dick. L. Rev. 645, 647 (1985). In day care sexual abuse cases, the largest number of victims are ages three and four. Finkelhor, Williams and Burns at 74-75.

[6] Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 984 (1968-69).

[7] *See, e.g.*, Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?* 17 New Eng. L. Rev. 643, 649 (1982).

[8] Goodman, Pyle-Taub, Jones, *et al.*, *Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims* 5-9, 104 (1989) (unpublished paper).

Courts and judges have also recognized the trauma experienced by child victims caught in the criminal prosecution system. In a 1974 study, 84% of the judges surveyed believed that children who testified in court in sexual abuse cases were traumatized as a result.[9] As the Court concluded in *State v. Sheppard*, 197 N.J. Super. 411, 431, 484 A.2d 1330, 1342 (1984): "[C]hildren who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse."

B. Face-to-Face Confrontation with the Accused Is the Single Most Frightening Courtroom Experience for Child Abuse Victims.

Child abuse is one of the most difficult crimes to detect and prosecute precisely because, most often, the only witness is the child. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Thus, any procedure which contributes to a child's unavailability as a witness in a case undermines successful prosecution. There is evidence that forcing every child abuse victim to face the alleged abuser in court will make children less available as witnesses.[10]

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[9] Lusk and Waterman, "Effects of Sexual Abuse on Children," in *Sexual Abuse of Young Children* 109 (1986) (citing Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 Judicature 303 (1974)).

[10] As many as 90% of the child abuse cases in one prosecutor's office were dismissed "as a result of problems attending the testimony of children who could not deal with the prospect of facing fathers, step-fathers, relatives and strangers in a courtroom setting." *State v. Sheppard*, 197 N.J. Super. at 417, 484 A.2d at 1333. *See also*, Comment, *The Young Victim As Witness For The Prosecution: Another Form of Abuse?*, 89 Dick. L. Rev. 721, 721-22 (1985) (cases reported dropped because the child could not testify at trial include one where a three year-old boy had gonorrhea of the mouth, penis, and rectum).

Research has identified the face-to-face confrontation with the accused in the courtroom as one of the most traumatizing post-abuse experiences for young victims. When investigators from the National Institute of Justice asked professionals in four United States cities what feature of the criminal justice system troubled children, the most frequently mentioned fear was facing the defendant. This fear was cited by all respondents in the study, including police, social workers, advocates, therapists, doctors and judges. As the authors concluded: "That experience is frightening for most adults, but to a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming."[11]

Gail Goodman and others investigating the emotional effects on child sexual abuse victims of testifying in criminal court discovered that children's negative responses to testifying in court are most pronounced in relation to having to face the defendant.[12] Children who were most frightened of

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[11] Whitcomb, Shapiro, and Stellwagen at 17-18.

[12] Goodman, Jones, Pyle-Taub, *et al.*, *Children in Court: The Emotional Effects of Criminal Court Involvement* 5 (unpublished paper presented at the 97th American Psychological Association Convention, New Orleans, Louisiana, August 1989) (hereinafter cited as "*Children in Court*"). The children in the study "expressed fears that he [97% of the defendants were male] would make faces at them, that he would plan revenge, and that they would be so frightened that they would go blank and not be able to answer questions. Indeed one young child walked into the courtroom, looked around, saw the audience and the defendant and ran out. She could not be convinced to return." Children who did testify in open court were somewhat relieved after the experience, but still disturbed about the confrontation with the defendant. *Id.*

the defendant suffered continued post-trial emotional disturbance.[13]

Truthful child victims' fears of defendants in child abuse cases stem from the dynamics of the abuse itself, which greatly magnifies the emotional distress attendant on testifying in open court. The intimidation that the child experiences when forced to confront the abuser is the cumulative result of the abuse, as well as the threats which have been made to silence the child. In most child abuse cases, the abuser is someone known to the child, usually in a relationship of trust and confidence.[14] Because of this on-going relationship, the abused child frequently has suffered from the abusive acts not once but repeatedly over an extended period of time and has been seriously threatened by the abuser in order to intimidate the child into silence.[15] Commonly, children are told that if they tell, their parents won't love them anymore,

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[13] *Id.* at 7.

[14] In the Goodman study of 218 criminal child abuse cases in the Denver area, only 6% of the defendants were strangers to the child victims. About 23% were fathers or step-fathers. The most frequent category included babysitters, teachers, church officials, and boy scout leaders. *Children in Court* at 4.

Defense attorneys also exacerbate children's courtroom trauma from face-to-face confrontation. It is common practice for defense attorneys to try to force child victims to look at the accused by standing beside the defendant during cross-examination. Bowes, *Libai's Child Courtroom: Is It Constitutional?*, 7 J. Juv. L. 31, 34 (1983).

[15] *See* MacFarlane, "Sexual Abuse of Children," in *The Victimization of Women* 81 (1978).

their parents will die, they will be killed, or they will get in a lot of trouble. *See, e.g., State v. Sheppard*, 197 N.J. Super. at 415-16, 484 A.2d at 1332. Children fear that the molester may carry out the threats he made to them to ensure nondisclosure.[16] Furthermore, children do not understand that because they are in a courtroom, the proximity of the accused poses no threat. The child, in fact, may believe that the defendant is likely to attack him or her right in the courtroom.[17]

In day care abuse cases such as *Craig*, researchers have concluded that children

> were more threatened, coerced and terrorized than children in many other kinds of sexual abuse. . . (T)he day care abuse situation seemed to attract more perpetrators whose motives involved sadism and terrorizing as an end in itself. In a typical sexual-abuse case outside of day care, a father may gain silence from his daughter by pointing out to her that he will go to jail if she tells. But the threats used on three-year-olds in day care were often of a much more monstrous quality, because perpetrators could

[16] Berliner, "Counseling and Follow-Up Interaction for the Sexually Abused Child," in *Management of the Physically and Emotionally Abused* 282 (1982).

[17] Goodman and Hegelson at 203. In one case involving a five-year-old girl, the defendant had allegedly threatened to kill the child and her mother if they reported the abuse. The child emerged from the courtroom with great relief and ran and told her mother: "Mom, he didn't give me the evil eye. I think he's just going to kill you and not me." *Children in Court* at 5-6.

> make outrageous claims that the three-year-olds were not knowledgeable enough to dismiss. The fear and terror that many of the children suffered as a result of being threatened and coerced seem to be a special part of the situation of day care abuse.

Finkelhor, Williams and Burns at 96.[18]

During the *Craig* pre-trial hearing on the State's motion to invoke the Maryland one-way closed circuit television procedure, therapists treating the children testified as to threats made by Mrs. Craig. Mary Burke, the therapist for the child victim in the case, explained that the child perceived that she was threatened by the day care operator and that she truly believed that her life and the lives of members of her family and the household pet were in jeopardy. (E. 75-76). Another child witness at the trial, who had also allegedly been abused by Mrs. Craig, was said to believe the defendant capable and willing to carry

[18] The authors studied cases of sexual abuse in day care nationwide occurring from 1983-1985. In 270 facilities where substantiated abuse had occurred, there were a total of 1,639 victimized children. *Id.* at 17. The authors found that "[s]ome kind of physical force—ranging from holding a child down, to tying her up, to hanging a child up by his heels—was present in 31% of all cases, and the threat of force in 42%." *Id.* at 93.

To prevent disclosures to parents when the children were outside the authority of the day care abuser, children were told that their parents or their pets would die or go to jail if they told. Abusers sometimes killed animals and invoked supernatural powers to prove to the children that they would punish them if they disclosed. "To such young children, even threats that might appear innocuous to adults may have been truly terrorizing. Children were threatened with snakes, spiders, wild animals and monsters." *Id.* at 95.

out threats against herself, her parents, and her sibling. (E. 80).

C. Confrontation with the Accused in the Courtroom Interferes with the Child's Ability to Testify.

Although this Court has often stated that confrontation ensures the integrity of the fact-finding process, *see, e.g., Coy*, 108 S. Ct. at 2802; *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965), the contrary is more often the case with child victim-witnesses. The stress-provoking factors of traditional criminal proceedings interfere with the child's ability to testify accurately and completely. "The physical presence of a defendant who is a threatening figure in a child's life, or even a non-threatening defendant about whom a child feels badly for having disclosed sexual secrets, along with the stigmatizing and guilt-provoking presence of the general public often constitute the primary impediments to a child's ability to testify about sexual abuse."[19]

Intimidation can interfere with the child's memory during the trial. Psychological research has shown that stress and intimidation can decrease a person's ability and willingness to recall information. The Yerkes-Dodson Law, a generally accepted psychological theory which explains the effects of stress on memory, posits that as stress increases, attention narrows and relevant information is excluded from the memory. The stress surrounding the sexual abuse itself may increase a child's inability to remember.[20]

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[19] MacFarlane, *Diagnostic Evaluations and The Use of Videotape in Child Sexual Abuse Cases*, 40 U. Miami L. Rev. 135, 149 (1985).

[20] *See* Thumann, *Admitting Videotaped Testimony in Cases Involving Sexual Abuse of a Minor*, 22 Colum. J. L. & Soc. Prob. 489, 503 (1989).

This effect may be compounded by stress-inducing trial practices, such as face-to-face confrontation with the abuser. As a prosecutor recounted in *State v. Sheppard*: "Children who did testify . . . frequently 'forgot' details, changed stories, or presented inconsistent facts. Ultimately, many broke down, cried, ignored questions and eventually refused to answer." 197 N.J. Super. at 417, 484 A.2d at 1333.

Researchers have confirmed that direct confrontation with a defendant has a detrimental impact on the child's ability to testify. In the Goodman study there was a direct correlation between children who were afraid of testifying in front of the defendant and their ability to answer prosecutors' questions. The more frightened the child was of the defendant, the fewer of the prosecutors' questions the children could answer and the less complete their answers.[21]

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[21] Goodman, Pyle-Taub, Jones, *et al., Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims* at 90-91, 109. *Accord* Dent and Stephenson, "Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses," in *Psychology, Law and Legal Processes* 195, 200-03 (1979). Benedek and Schetky, *The Child As A Witness*, 37 Hospital and Community Psychiatry 1225, 1227 (Dec. 1986).

One empirical study indicates that children questioned in a small room respond to questions more accurately and completely than children questioned in a traditional courtroom. In the study, children questioned in the courtroom setting exhibited anxiety and were generally unable or unwilling to make an in-person identification of a defendant in the courtroom. Hill and Hill, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev. 809, 814-16 (1987).

As the Maryland Court of Special Appeals remarked in regard to the use of the Maryland closed circuit statute:

> Keeping in mind the threshold requirement in § 9-102 [a child could not 'reasonably communicate' in the defendant's presence], what is to be gained from forcing a child victim to testify in the direct presence of the defendant when the only product of it will be further suffering for the child, rather than any meaningful evidence—*in*culpatory or *ex*culpatory?

Craig v. State, 76 Md.App. at 283, 544 A.2d at 800.

Placing the child in a stressful courtroom situation may also make the child more susceptible to suggestion; information retrieval failures predict heightened suggestibility and false recantations may thereby be produced.[22] In other words, the intimidating environment of the courtroom and the physical proximity to the alleged abuser causes some child victims to take back initial truthful statements.[23] Thus, the traditional lore that a witness's veracity increases when *facing* the defendant is simply wrong when applied to child abuse victims. *Contra Coy*, 108 S. Ct. at 2802.

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[22] Goodman and Hegelson at 203-04. Recantations, or retracting the original report, are a recognized phenomenon of the "child sexual abuse syndrome." *See* Summit, *The Child Sexual Abuse Accomodation Syndrome*, 7 Child Abuse and Neglect 177 (1983).

[23] Berliner, Canfield-Blick and Bulkley, "Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development," in National Legal Resource Center for Child Advocacy and Protection, ABA, *Child Sexual Abuse and the Law* 172 (1983).

Courts have recognized that reduction of the child's stress in testifying aids the judicial truth-determining function. In allowing the use of one-way closed circuit testimony subject to cross-examination, the New Jersey Superior Court relied on the opinion of a recognized expert in forensic psychology to the effect that the avoidance of an in-court appearance through the use of video equipment would improve the accuracy of the child's testimony. The psychologist indicated that the courtroom atmosphere was more likely to produce *inaccurate* testimony, because the child would become fearful, guilty, anxious and traumatized when confronting an abuser, particularly a relative. The child's feelings would mitigate the truth. "The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of testimony." *State v. Sheppard*, 197 N.J. Super. at 416, 484 A.2d at 1332. *See also State v. Tafoya*, 105 N.M. 117, 729 P.2d 1371 (Ct. App.), *cert. denied*, 105 N.M. 94, 728 P.2d 845 (1986), *cert. granted, judgment vacated and case remanded for further consideration in light of Coy v. Iowa*, 108 S. Ct. 2890, *aff'd on remand*, 108 N.M. 1, 765 P.2d 1183 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988), *cert. denied*, 109 S. Ct. 1572 (1989); *State v. Melendez*, 135 Ariz. 390, 661 P.2d 654 (1982).

Therefore, the state's public policy interests in protecting children and prosecuting child abuse cannot be met if every child abuse victim is forced into a face-to-face confrontation with the defendant. Traditional courtroom procedures designed to enhance the truth-determining process with adults may actually impede the pursuit of truth with vulnerable child victims while re-traumatizing the child. Successful pros-

ecution and, thus, deterrence of the crime of child abuse will be hampered by a strict adherence to physical confrontation with the defendant.

II. THE CONFRONTATION RIGHT, LIKE MANY OTHER CONSTITUTIONAL RIGHTS, IS NOT ABSOLUTE, BUT INCORPORATES A CONCEPT OF BALANCING IN THE INTERESTS OF JUSTICE.

A. America's Criminal System Justice Reflects a Balancing of Society's Interest in Effective Prosecution of Crimes and its Interest in Ensuring that Innocent Persons Not Be Convicted.

America's system of criminal justice, including its rules of evidence, is designed to enhance the integrity of the fact-finding process so as to lead to a just result. Two fundamental competing interests have been balanced in this effort: (1) punishment (and thereby deterrence of) crimes and (2) protection of innocent individuals wrongly accused. The fabric of our criminal procedure is woven with threads from each.

For example, the accused is protected by the imposition on the prosecution of a more onerous burden of persuasion than exists in civil cases: guilt must be proved beyond a reasonable doubt. But even this standard is not as protective of the accused as it could be, since we do not require guilt to be proved beyond *any* doubt. The standard chosen is one of compromise, and it reflects a balancing of the dual interests of justice.

B. The Confrontation Right Was Included in the Constitution as Only One Specific of Due Process to Ensure Fair Process to a Criminal Defendant.

In addition to including the Due Process Clause in the Fifth Amendment, the authors of the Bill of

Rights listed several specific protections in the Sixth Amendment to guard against the repetition in America of injustices against accused persons in the not so distant history of England.

In 1603, Sir Walter Raleigh had been convicted of treason and executed on the strength of two out-of-court statements by persons who did not testify at trial. One was an unnamed "Portuguese gentleman." J.G. Phillimore, *History and Principles of the Law of Evidence* 157 (1985). The other was Lord Cobham, Raleigh's alleged coconspirator who had made a confession while being held prisoner—and no doubt tortured—in the Tower of London. (To make matters worse, Cobham apparently also had recanted the statement, but then had recanted the recantation.)

Gross injustices such as Raleigh's execution led to the inclusion in the Sixth Amendment of the right of the accused "to be confronted with the witnesses against him" so as to be able to cross-examine each and test his or her perception, memory, and sincerity, while the fact-finder could see the witness's demeanor. As this Court has stated:

> The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometime admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his

> demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895).

C. The Confrontation Right, like Many Other Constitutional Rights, Is Not Absolute but Must Be Evaluated in Light of the Values It Seeks to Protect: Fair Process, the Disclosure of the Truth, and the Enhancement of Justice.

1. Such an Evaluation Requires a Balancing of Competing Interests, such as this Court Has Made with Regard to Other Constitutional Rights in Addition to the Confrontation Right.

On many occasions this Court has recognized that constitutional "rights" are often not absolute. For example, although the Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed," this Court has never held that the federal government may not reasonably regulate that right. *See, e.g., Lewis v. United States*, 445 U.S. 55 (1980) (upholding federal prohibition of gun ownership by convicted felons when the firearm has been used in interstate commerce); *United States v. Miller*, 307 U.S. 174 (1939) (sustaining federal registration of sawed-off shotguns). As a further example, the state's interest in the welfare of children may circumscribe limits on the Fifth Amendment privilege against self-incrimination. *See Baltimore Dep't of Social Servs. v. Bouknight*, No. 88-1182 (U.S. February 20, 1990) (a mother may not invoke the privilege to resist a court order to produce her missing child).

Similarly, Sixth Amendment rights other than the confrontation right, which on their face might appear to be absolute, have not been so interpreted. For

example, the accused's right to a "public trial" must sometimes give way, at least in part, to countervailing considerations. *Waller v. Georgia*, 467 U.S. 39 (1984) (recognizing that the right to an open trial is not absolute).

The accused's Sixth Amendment right to a jury trial also has been subject to balancing. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (the Sixth Amendment does not require jury unananimity; 11 to 1 and 10 to 2 jury convictions serve equally well the interest of the defendant in having the judgment of his or her peers interposed between himself or herself and the officers of the state who prosecute and judge him or her).

The accused's Sixth Amendment right to "compulsory process for obtaining witnesses in his favor" has sometimes had to give way to a particular privilege. For example, this Court's decisions construing the informer's privilege balance the accused's need to know the identity of the informer in order to make a defense against the government's interest in protecting the flow of information to it. *See, e.g., Roviaro v. United States*, 353 U.S. 53, 62 (1957) ("We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for *balancing* the public interest in protecting the flow of information [to law enforcement officials] against the individual's right to prepare his defense.") (emphasis added).[24]

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[24] *See generally* White, *Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence*, 80 J. Crim. L. & Criminology 377 (1989) (suggesting that greater deference should be given to privileges which are primarily con-

This Court has also engaged in balancing of competing interests against the Sixth Amendment right to counsel. *See Caplin v. Drysdale*, 109 S.Ct. 2646 (1989) (upholding seizure of funds to be used for attorney's fees in narcotics case).

2. This Court Has Historically Performed such a Balancing in its Decisions Construing the Confrontation Clause.

This Court repeatedly has recognized that the Sixth Amendment right of confrontation "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. at 243; *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). *See also Coy v. Iowa*, 108 S.Ct. at 2803 (leaving the question for "another day").

Even where the witness was unavailable for trial, the admission of his or her out-of-court statement against the accused has been upheld when that statement bore circumstantial guarantees of reliability, so that its *exclusion* would hamper accurate fact-finding. *See, e.g., Ohio v. Roberts*, 448 U.S. at 63. (prior testimony admitted; literal interpretation of Confrontation Clause rejected as "unintended and too extreme;" hearsay may be admitted against accused if the state has made showing of necessity, as by unavailability of the hearsay declarant, and statement bears sufficient indicia of reliability); *Mattox v. United States*, 156 U.S. 237 (hearsay exception for prior testimony). In these cases, of course, the jury had *no* opportunity

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cerned with a victim's privacy rather than those which are solely designed to assist the government).

to observe the demeanor of the out-of-court declarant. *See also Bourjaily v. United States*, 483 U.S. 171 (1987) (admission under Fed. R. Evid. 801(d)(2)(E) of out-of-court statement of an unavailable coconspirator does not violate the accused's confrontation right; coconspirator hearsay exception (nonhearsay under Fed. R. Evid.) is firmly enough rooted in our jurisprudence that, under *Ohio v. Roberts*, 448 U.S. 56, a court need not independently inquire into the reliability of such statements).

Even unavailability of the declarant is not always constitutionally mandated. *E.g., United States v. Inadi*, 475 U.S. 387 (1987) (coconspirator need not be shown to be unavailable to testify before coconspirator's statement made during and in furtherance of the conspiracy may be admitted against defendant).

This Court's cases also repeatedly have emphasized the opportunity for effective cross-examination as central to the confrontation right. *E.g., Kentucky v. Stincer*, 482 U.S. at 730; *Lee v. Illinois*, 476 U.S. 530, 540-41 (1986); *Douglas v. Alabama*, 380 U.S. at 418. *See Olden v. Kentucky*, 109 S.Ct. 180 (1988) (per curiam) (reversible error, and deprivation of right of confrontation, to disallow defense's questioning of rape victim about her cohabitation with person to whom she reported rape, to show her motive to lie when she had consented to intercourse with defendant); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (Confrontation Clause was not violated when expert witness failed to recall the basis of his opinion, because the Clause "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish").

III. ADVANCEMENT OF COMPELLING STATE INTERESTS IN PROTECTING CHILD VICTIMS FROM FURTHER UNNECESSARY TRAUMA AND IN PROSECUTING CHILD ABUSE JUSTIFIES THE MINIMAL INFRINGEMENT HERE OF AN ACCUSED'S CONFRONTATION RIGHT.

The state has a *parens patriae* interest in protecting children from harm. As this Court recognized in *Prince v. Massachusetts*, 321 U.S. 158 (1944), "[d]emocratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Id.* at 168. In yet another case, *New York v. Ferber*, 458 U.S. 747 (1982), this Court identified prevention of sexual exploitation and abuse of children as constituting a governmental objective of surpassing importance. *Id.* at 757. It also indicated that it had sustained legislation aimed at protecting the physical and emotional health of children even when the laws operated in the area of constitutionally protected rights. *Id.* at 756.

This Court also addressed these interests in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) when it stated that, "[t]he state interests asserted to support Section 16A [the mandatory trial closure rule struck down] though articulated in various ways, are reducible to two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner." *Id.* at 607.[25] In *Globe Newspapers* this Court concluded

[25] The Court took special note of factors articulated by the Massachusetts Supreme Judicial Court in an earlier remand of

that those interests were compelling and held that they could be addressed by requiring a trial court to determine on a case-by-case basis whether the special child protection procedure of closing the courtroom was necessary. *Id.* at 609.

The State's compelling interest in protecting child sexual abuse victims from further unnecessary trauma, coupled with the need to encourage the flow of information about crimes to law enforcement officials, *see, e.g., Roviaro v. United States*, 353 U.S. at 62; *Ohio v. Roberts*, 448 U.S. 56, must be balanced against the accused's confrontation right in cases such as this where the prosecution has shown that the child will be further traumatized by testifying in the defendant's physical presence.

The trial court, in making this finding, ought to be able to rely, as did the trial judge in *Craig*, on the testimony of experts it finds to be credible who are subject to cross-examination, a procedure found insufficient by the court below. *Cf. Glendening v. State*, 536 So. 2d 212 (Fla. 1988), *cert. denied*, 109 S.Ct. 3219 (1989); *Altmeyer v. State*, 496 N.E.2d 1328 (Ind.

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the case. The Massachusetts court stated the interests to be:

> (a) to encourage minor victims to come forward to institute complaints and give testimony . . . ; (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage . . . (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote sound and orderly administration of justice . . . ; and (e) to preserve evidence and obtain just convictions.

Id. at 607 n.18.

App. 1986) (upholding Ind. Code Ann. § 35-37-4-6(c)(2)(i) (West 1986) which allows certification by a psychiatrist that the child would be traumatized by so testifying, to show that the child is unavailable to testify); Cal. Evid. Code § 240 (West Supp. 1990) (expert testimony regarding the child's trauma is sufficient).[26]

The Maryland Court of Appeals decision in *Craig* is contrary to the previously stated compelling governmental interest of protecting child victims of sexual abuse in the prosecution of such cases. While it acknowledges the competing interests of the right to confrontation and the protection of the child witness, it reads *Coy* too narrowly in limiting the use of the exception contemplated in Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii). The Maryland Court of Appeals erroneously concludes that the defendant's constitutional right of confrontation outweighs the serious emotional harm a child victim could endure and the likelihood that the trauma of confronting the abuser in court will hinder the child's ability to communicate in the open courtroom.

In the case before this Court, there was expert testimony of the children's inability to testify when confronting the defendant in person. The child victims testified under oath, were seen by the jury, and were subject to complete cross-examination. This should be held to satisfy the Sixth Amendment's mandate.

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[26] By analogy, where the prosecution proves a witness to be unavailable due to physical or mental illness, it may offer particular types of out-of-court statements by the witness under exceptions to the hearsay rule. *See* Fed. R. Evid. 804.

CONCLUSION

By its overly strict interpretation of the confrontation requirement of the Sixth Amendment, the Court of Appeals of Maryland, relying on *Coy*, has effectively nullified Maryland's closed circuit television law meant to protect child victims, a statute that, by its own terms, requires a case-specific finding of necessity before the closed-circuit procedure may be used. The Maryland court, in erecting a two-step confrontation hurdle for children and prosecutors to surmount before the protective procedures in the statute may be invoked, has required that abused children be subjected to that very emotional trauma from which the law was intended to protect them.

The precedents of this Court indicate that protection of children and prosecution of child abuse are compelling State interests. When such interests are balanced against a defendant's Sixth Amendment confrontation right, the minimal infringement which occurred in the *Craig* trial is justified.

For these reasons, *amici* request this Court to reverse the decision of the Court of Appeals of Maryland which overturned the conviction of Sandra Ann Craig in the Circuit Court for Howard County, Maryland.

Respectfully submitted,

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